

May 16, 1994

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Dear Ms. Trask and Ms. Bullard:

Re: Resumés of Hawaiian Sovereignty Advisory
Commission Members

This is in response to Ms. Trask's September 30, 1993 request to the Office of Information Practices ("OIP") and Ms. Bullard's October 28, 1993 request to the OIP for an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), summaries of the backgrounds of Hawaiian Sovereignty Advisory Commission ("Commission") members maintained by the Commission must be made available for public inspection and copying, upon request.

BRIEF ANSWER

Yes. Section 92F-12(a)(14), Hawaii Revised Statutes, specifically makes public, any provision to the contrary notwithstanding, the "education and training background, [and]

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previous work experience . . . of present or former officers or employees of [an] agency." After examining the definition of "agency" provided in section 92F-3, Hawaii Revised Statutes, as well as the duties and responsibilities of the Commission set forth in Act 359, Session Laws of Hawaii 1993, we are of the opinion that the Commission constitutes an "agency" for purposes of the UIPA.

Although we realize the Commission members are not necessarily government employees, based upon our research, we believe that Commission members are "officers" of an agency for purposes of section 92F-12(a)(14), Hawaii Revised Statutes. Consequently, in our opinion, information concerning the education and training background, and previous work experience of Commission members, must be publicly available under section 92F-12(a)(14), Hawaii Revised Statutes.

In a previous OIP advisory opinion, we concluded that the previous work experience of nominees to government boards and commissions must be made available for public inspection under the UIPA if such work experience is a requirement for the government position. See OIP Op. Ltr. No. 91-8 (June 24, 1991).

However, in reaching this conclusion, the legal analysis in OIP Opinion Letter No. 91-8 focused on sections 92F-14(b)(5) and 92F-13(1), Hawaii Revised Statutes. Thus, in that opinion letter, the OIP concluded that the nominees had a significant privacy interest in their previous work experience not required for the position, and that this significant privacy interest outweighed the public interest in disclosure. Because OIP Opinion Letter No. 91-8 was limited to the disclosure of information concerning nominees for boards and commissions, the OIP did not need to examine the scope of the term "agency officers or employees" in section 92F-12(a)(14), Hawaii Revised Statutes.

The UIPA's legislative history provides that if the record or information requested falls within any of the categories listed in section 92F-12(a), Hawaii Revised Statutes, the UIPA's exceptions for personal privacy and for frustration of legitimate government function do not apply. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). The legislative history further provides that the "list merely addresses some particular cases by unambiguously requiring disclosure." Id. Because we believe that section 92F-12(a)(14), Hawaii Revised Statutes, affirmatively requires the disclosure of

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education and training background information and the previous work experience of Commission members as "agency officers," we need not address the UIPA's personal privacy exception.

Accordingly, we believe that the information listed in section 92F-12(a)(14), Hawaii Revised Statutes, including all education and training background information and previous work experience, that is contained in the summaries provided by the Commission members should be made publicly available for copying and inspection. However, confidential personal information such as a Commission member's social security number, birth date, home address, and home telephone number must be segregated from the summary before it is disclosed.

The Commission has informed the OIP that although the Commission has received background summaries from most of the Commission members, a few of the Commission members refuse to provide their summaries. Under the UIPA, the Commission is only required to disclose the summaries that the Commission maintains.

See Haw. Rev. Stat. §§ 92F-3 and 92F-11(a) (Supp. 1992); OIP Op. Ltr. No. 90-31 (Oct. 25, 1990). Thus, the UIPA does not require the Commission to compel Commission members to submit their summaries in order to respond to your requests for access to the summaries.

FACTS

The Commission was created by the Legislature during the 1993 Legislative Session to study self-determination and self-governance for Hawaiians. Act 359, Session Laws of Hawaii 1993, provides that the Commission shall advise the Legislature on:

- (1) Conducting special elections related to this Act;
- (2) Apportioning voting districts;
- (3) Establishing the eligibility of convention delegates;
- (4) Conducting educational activities for Hawaiian voters, a voter registration drive, and research activities in preparation for the convention;
- (5) Establishing the size and composition of the convention delegation; and
- (6) Establishing the dates for the special elections.

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Act 359, § 4(b), 1993 Haw. Sess. Laws 1011-1012 (1993).

In addition, section 4(c) of Act 359 requires the Commission to submit a report of its findings and recommendations to the Legislature "not less than twenty days prior to the convening of the regular session of 1994." Act 359, § 4(c), 1993 Haw. Sess. Laws 1012 (1993).

The 20 member Commission is placed administratively under the Office of State Planning ("OSP"). Members of the Commission were selected as follows:

The commission shall consist of nineteen members appointed by the governor without regard for section 78-4, Hawaii Revised Statutes. At least twelve of the nineteen members shall be appointed from nominations submitted by Hawaiian organizations. Among the twelve, the governor shall appoint one member so designated from each of the following organizations: the Office of Hawaiian Affairs; Ka Lahui Hawai'i; the State Council of Hawaiian Homestead Association; and the Association of Hawaiian Civic Clubs. The commission shall consist of at least one member from each of the islands, or island groups of: Kauai or Niihau; Maui; Molokai or Lanai; Oahu; and Hawaii. Appointments shall be made before August 1, 1993, and shall not be subject to confirmation by the senate. Any appointment not made by that date shall be filled by the commission during its first meeting which shall be held before August 15, 1993.

Act 359, § 4(a), 1993 Haw. Sess. Laws 1012 (1993).

Although Act 359 provides for nineteen members, the Commission actually consists of twenty members, with one member serving ex-officio representing native Hawaiian groups on the mainland United States.

On August 4, 1993, Ms. Bullard contacted the Governor's Office to request the resumés or biographies of the Commission members. She was referred to the OSP, and was told by the OSP to put her request in writing. In a letter dated August 4, 1993, to

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Norma Wong, Deputy Director of OSP, Larry Meacham, Executive Director of Common Cause Hawaii ("Common Cause"), requested copies of the resumé. Around this time, Ms. Trask also requested the Commission to provide her with copies of the Commission members' resumé. Because the Commission did not have resumé or biographies of the Commission members in its files, at its public meeting on August 14, 1993, the Commission requested its members to prepare and submit summaries of their backgrounds.

After submitting their summaries to the Commission, certain Commission members expressed opposition to having their summaries made public. The Commission has informed the OIP that thirteen members have agreed to make their summaries public and that these summaries have been provided to Common Cause and Ms. Trask. Two other members have submitted their summaries to the Commission, but requested that they be withheld pending an advisory opinion from the OIP on the issue. The remaining five members have not submitted their summaries to the Commission. The OSP has informed the OIP that the summaries submitted by the Commission members vary in length and detail.

Ms. Trask, in her request to the OIP for an advisory opinion, also asked the OIP to determine whether records discussed at the Commission's public meetings must be made available for public inspection and copying under the UIPA. Previously, Ms. Trask had requested copies of these records from the Commission, but was denied.

In a telephone conversation between the OIP and the OSP, the OIP was informed that there was a misunderstanding between Ms. Trask and the Commission, and that the Commission considers all records discussed at its public meetings to be a matter of public record. The OIP subsequently informed Ms. Trask, in a letter dated October 28, 1993, to contact the Commission to obtain copies of these records. Consequently, this advisory opinion will not address the issue of whether records discussed at the Commission's public meetings are public under the UIPA.¹

¹In OIP Opinion Letter No. 91-22 (Nov. 25, 1991), we found that the disclosure, under the UIPA, of intra-agency memoranda discussed at public meetings must be determined on a case by case analysis. We noted that where such memoranda are protected by the deliberative process privilege, the agency may choose to disclose, and that the OIP encourages disclosure under these circumstances. We also noted that the deliberative process

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DISCUSSION

I. COMMISSION CONSTITUTES AN "AGENCY" UNDER THE UIPA

Under the UIPA, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). The term "agency" is defined in section 92F-3, Hawaii Revised Statutes, and includes:

[A]ny unit of government in this State, any county, or any combination of counties, department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added).

In OIP Op. Ltr. No. 94-2 (March 21, 1994), we examined the duties and responsibilities of the Review Commission on the State Water Code ("Review Commission") and concluded that it performs a governmental function by reviewing all matters relating to the State's water code. The placement of the Review Commission within the Legislative Reference Bureau for administrative purposes was also significant because we believed it evinced the Legislature's intent that the Review Commission function as a government entity.

Similarly, the Commission in the present case was created to advise the Legislature on issues of self-determination and self-governance for Hawaiians, and the Commission was placed administratively within the Office of State Planning. Based upon these factors, and the definition of "agency" provided in section

privilege could be waived by the substantial discussion of the contents of the memoranda at a public meeting.

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92F-3, Hawaii Revised Statutes, we believe that the Commission constitutes an "agency" for purposes of the UIPA.

II. THE COMMISSION MEMBERS ARE AGENCY "OFFICERS" UNDER THE UIPA

In addition to the UIPA's general rule of disclosure noted earlier, section 92F-12(a), Hawaii Revised Statutes, sets forth a list of government records that agencies are required to make available for public inspection and duplication "[a]ny provision to the contrary notwithstanding." The UIPA's legislative history further provides that "[a]s to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable This list merely addresses some particular cases by unambiguously requiring disclosure." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

Section 92F-12(a)(14), Hawaii Revised Statutes, specifically makes public:

The name, compensation (but only the salary range for employees covered by or included in chapters 76, 77, 297, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency;

Haw. Rev. Stat. §92F-12(a)(14) (Supp. 1992) (emphases added).

We realize that the members of the Commission are not considered agency "employees." However, we must determine whether the Commission members are agency "officers" for purposes of section 92F-12(a)(14), Hawaii Revised Statutes.

Preliminarily, we find it useful to examine the definitions of "office" and "officer." Black's Law Dictionary defines the term "[o]ffice" as:

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A right, and correspondent duty, to exercise a public trust. . . . An employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental. The most frequent occasions to use the word arise with reference to a duty and power conferred on an individual by the government; A public charge or employment, and he who performs the duties of the office is an officer.

Black's Law Dictionary 976 (5th Edition 1979).

Black's Law Dictionary further provides that an "[o]fficer" is a "[p]erson holding office of trust, command or authority in corporation, government, armed services, or other institution or organization." Id. at 977. A "[p]ublic officer" is "[o]ne occupying a public office created by law. One of [the] necessary characteristics of 'public officer' is that he performs [a] public function for public benefit and in so doing he be vested with exercise of some sovereign power of state." Id. at 978.

In an advisory opinion concerning whether unsalaried public officers are entitled to the same fees and allowances as witnesses, the Attorney General of Hawaii found that "[e]xamples of unsalaried public officers are members of boards and commissions who are not compensated on a salary basis by the State or counties." Haw. Att'y Gen. Op. 73-1 at 4 (March 23, 1973). Later that same year, another Attorney General Opinion was issued stating that members of boards and commissions who hold over upon the expiration of their terms are de facto officers. See Haw. Att'y Gen. Op. 73-7 at 5 (July 2, 1973).²

²In an earlier opinion, the Hawaii Attorney General found that membership on the Travel Industry Development Board does not constitute holding a "public office" for purposes of section 8, article III of the Constitution of the State of Hawaii, which prohibits a member of the Legislature from holding any other "public office." Haw. Att'y Gen. Op. 69-12 at 3 (May 5, 1969). However, we believe that the present situation can be distinguished from Opinion No. 69-12 because we are determining whether the Commission's members are "officers" of the Commission within section 92F-12(a)(14), Hawaii Revised Statutes, not whether the Commission members are holding "public office" under section 8, article III of the State Constitution.

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Based upon the authorities cited above, we are of the opinion that the Commission members are "officers" of an agency for purposes of section 92F-12(a)(14), Hawaii Revised Statutes.

III. CONFLICTING UIPA PROVISIONS

In a previous OIP advisory opinion, the OIP addressed whether background information about nominees to State boards and commissions must be made available for public inspection and copying under the UIPA. In OIP Opinion Letter No. 91-8 (June 24, 1991), the OIP found that the privacy interest of nominees for boards and commissions in their background information is outweighed by the public interest in disclosure. Specifically, the disclosure of this information "would reveal the composition, conduct, and potential conflicts of interest of board and commission members whom the Governor appoints with the Senate's approval." OIP Op. Ltr. No. 91-8 at 5.

Thus, the OIP found that the disclosure of certain information concerning nominees to boards and commissions would not constitute a clearly unwarranted invasion of personal privacy, and that the following information should be made available, under the UIPA, for public inspection and copying: name, current occupation, business address, business telephone number, educational background, and work experience required for appointment to the board or commission. However, the OIP also concluded that the UIPA's personal privacy exception protects information about nominees such as their home address, home telephone number, birth date, and work experience which is unrelated and not required for appointment to the board or commission. See OIP Op. Ltr. No. 91-8 at 7.

We note that OIP Opinion Letter No. 91-8 did not address or examine section 92F-12(a)(14), Hawaii Revised Statutes, because the individuals concerned were "nominees" rather than agency "employees" or "officers." In determining whether information concerning the previous work experience of the nominee is protected by the UIPA's privacy exception, the OIP examined section 92F-14(b)(5), Hawaii Revised Statutes.³ Concluding that

³Section 92F-14(b)(5), Hawaii Revised Statutes, states that an individual has a significant privacy interest in "[i]nformation relating to an individual's nongovernmental

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nominees have a significant privacy interest in nongovernmental work experience that is not required for appointment to the board or commission, and that this significant privacy interest outweighs the public interest in disclosure, the OIP found that only information concerning work experience required for the government position should be disclosed.

Section 92F-12(a)(14), Hawaii Revised Statutes, affirmatively requires the disclosure of the "previous work experience" of agency officers and employees, any provision to the contrary notwithstanding. In contrast, section 92F-14(b)(5), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in the "individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position." Thus, there is a conflict between these two sections of the UIPA.

However, in determining which section is controlling, we find it significant that the list of information required to be disclosed in section 92F-12(a), Hawaii Revised Statutes, is disclosable "as a matter of public policy" and that the list "addresses some particular cases by unambiguously requiring disclosure." See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). Further, the legislative history of this provision states that "[a]s to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." Id.

The list of public records in section 92F-12(a), Hawaii Revised Statutes, was added by the Legislature based upon the recommendations of the Report of the Governor's Committee on Public Records and Privacy (1987). In contrast, the list of information in which individuals have a significant privacy interest contained in section 92F-14(b), Hawaii Revised Statutes, was taken directly from section 3-102(b) of the Uniform Information Practices Code drafted by the National Conference of Commissioners on Uniform State Laws in 1980 ("Model Code").⁴

employment history except as necessary to demonstrate compliance with requirements for a particular government position."

⁴Section 3-102(b) of the Model Code, like section 92F-14(b), Hawaii Revised Statutes, provides "examples of information in which the individual has a significant privacy interest."

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Thus, in our opinion, the Legislature specifically intended that information concerning all of the previous work experience of agency officers and employees is public under section 92F-12(a)(14), Hawaii Revised Statutes, and not just information concerning previous work experience that is required for the government position.

Our conclusion is also supported by the general rule of statutory construction that where a plainly irreconcilable conflict exists between a law of general application and a law of specific application, the specific authority will generally prevail. State v. Wallace, 71 Haw. 541 (1990). See 2B N. Singer, Sutherland Statutory Construction § 51.05 at 174 (Sands 5th ed. rev. 1992); see also OIP Op. Ltr. No. 93-7 at 6-7 (July 27, 1993); OIP Op. Ltr. No. 92-10 at 12 (Aug. 1, 1992).

Moreover, in previous OIP advisory opinions, we have observed that "like the federal Freedom of Information Act, 5 U.S.C. § 552 (1988), and the open records laws of other states, the UIPA's affirmative disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure." See OIP Op. Ltr. No. 93-10 at 2 (Sept. 2, 1993); OIP Op. Ltr. No. 93-5 (June 7, 1993); and OIP Op. Ltr. No. 92-27 (Dec. 30, 1992).

Given the foregoing, we conclude that members of the Commission are agency "officers" for purposes of section 92F-12(a)(14), Hawaii Revised Statutes and, therefore, the information about the Commission members that is listed in section 92F-12(a)(14), Hawaii Revised Statutes, must be made public upon request. Because the legislative history of the UIPA instructs that the UIPA's exception for personal privacy does not apply to determine the disclosure of the information listed in section 92F-12(a), Hawaii Revised Statutes, the fact that an individual has a significant privacy interest in nongovernmental employment history "except as necessary to demonstrate compliance with requirements for a particular government position," see section 92F-14(b)(5), Hawaii Revised Statutes, is not controlling, based upon these facts.

Included in this list is "information relating to an individual's non-governmental employment history." Model Code § 3-102(b)(5) (1980).

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Accordingly, all of the information listed in section 92F-12(a)(14), Hawaii Revised Statutes, that is included in the Commission members' summaries should be made available for public inspection and copying. However, confidential personal information about the Commission members which may be contained in the summaries such as home addresses, home telephone numbers, birth dates, and social security numbers should be segregated from the summary before public disclosure.⁵

Finally, the UIPA only requires agencies to provide access to existing records maintained by the agency. See OIP Op. Ltr. No. 93-16 (Oct. 1, 1993). Some of the Commission members refused to provide their summaries to the Commission. In responding to your requests for access to the summaries, the Commission must permit you to inspect and copy the summaries currently maintained by the Commission, and the Commission is not required under the UIPA to compel the other Commissioners to provide their summaries for your inspection and copying.⁶

CONCLUSION

Information contained in the summaries prepared by the Commission members concerning their education and training background, previous work experience, present employer, and business address must be made available for public inspection and copying under section 92F-12(a)(14), Hawaii Revised Statutes. However, information such as a Commissioner member's home

⁵See OIP Op. Ltr. No. 92-18 (Sept. 16, 1992) (pesticide applicator certification applicants' home addresses and home telephone numbers are confidential under the UIPA); OIP Op. Ltr. No. 92-20 (Oct. 13, 1992) (birth dates and social security numbers of apprentices are confidential); OIP Op. Ltr. No. 90-7 (Feb. 9, 1990) (birth dates and social security numbers of teachers must be withheld under the UIPA's personal privacy exception).

⁶The UIPA only applies to government records, which term is defined as "information maintained by an agency in written auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added). Agencies do not have a duty under the UIPA to create records in order to respond to a request. See OIP Op. Ltr. No. 90-31 (Oct. 25, 1990) and OIP Op. Ltr. No. 93-16 (Oct. 1, 1993).

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address, home telephone number, birth date, and social security number must be segregated from the summary before disclosure to avoid a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Further, the Commission is only required to provide access to summaries currently maintained by the Commission, and is not required, under the UIPA, to compel Commission members to provide summaries in order to respond to your request.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

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Director

SML:sc
c: Ms. Tara Lulani McKenzie
Hawaiian Sovereignty Advisory Commission